No. 7306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ETHLYN B. CLEMENTS, individually and as administratrix of the estate of Ralph L. Clements, also known as R. L. Clements, deceased,

Appellant,

vs.

GEORGE W. COPPIN, as Trustee in Bankruptcy of the estate of the Flintex Corporation, a corporation,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Statement of Case.

This is an appeal from an order of imprisonment and commitment for civil contempt by reason of the refusal of appellant to pay over to the Clerk of the above entitled Court for the benefit of appellee as Trustee of the Flintex Corporation, bankrupt, certain trust funds, the property of the bankrupt, in her possession and under her control in disobedience of a turn over order. (R. 1-3).

The main case from which the contempt proceedings issued was an action in equity to fasten a trust upon certain funds of said Flintex Corporation which wrongfully and fraudulently came into the hands of appellant in part as an individual and in part as administratrix of the estate of her deceased husband, Ralph L. Clements.

The case was tried twice, each time resulting in a decree in favor of appellee, creating an involuntary trust as to said funds and granting a reference for an accounting to W. E. T[illegible]er, Esq., as Special Master. An appeal was taken to this Court from each of said decrees, the first was reversed upon jurisdictional grounds which objection was removed prior to the second trial. (*Matthew v. Coppin,* 32 Fed. (2) 100). The decree from which the second appeal was taken was affirmed. (*Clements v. Coppin,* 62 Fed. (2) 552.

On the 21st day of April, 1933, the Special Master filed a report in which he found that $22,500.00 of said trust funds passed into the hands of appellant as an individual, and that of said sum there was $11,-979.00 in her possession and control; that $7,259.12 of said trust funds passed into her hands as administratrix of the estate of her deceased husband, and that $4,805.20 of said sum was in her possession and under her control. (R. 1-3; 10-14).

No objections or exceptions were reserved by appellant as against said report, and on the 22nd day of May, 1933, upon hearing, the United States District Court adopted and confirmed the report of said

Special Master and issued the turn over order in question, dated May 22nd, 1933, directing appellant to turn over said trust funds to the Clerk of said United States District Court within ten days from the date of service of said order upon appellant. (R. 1-3).

Upon the termination of said ten days, and on June 3rd, 1933, appellant filed a purported answer to said turn over order of May 22nd, 1933, denying possession or control of said trust funds. (R. 3-4). The appellant failing to comply with said turn over order within the time indicated therein, or at all, the Court issued an order directing appellant to appear upon a day certain, to-wit: the 19th day of June, 1933, and show cause why she should not be adjudged guilty of contempt for failure to comply with said order. (R. 8-10). Said order to show cause came on for hearing on said return day, and appellant with her counsel appeared and made an informal motion for a re-reference to the Special Master to re-open the hearing before said Special Master and to permit her to present evidence which she had failed to do before the making of said turn over order. (R. 16-19). Neither the character of the evidence sought to be introduced before the Special Master was revealed, nor was any reason assigned why such evidence was not presented to the Special Master prior to the turn over order and during the hearing before him.

The motion was denied, to which no exception was taken. No affidavit, or any other paper, was filed by appellant in answer to said order to show cause, nor

was any testimony or other evidence offered by appellant showing inability to comply with the said turn over order by reason of any cause or causes arising after the issuance of said turn over order. Nor were any exceptions reserved as against any of the proceedings taken on said order to show cause by appellant.

Upon the failure to present any evidence as above indicated the Court made the order, adjudging her to be guilty of contempt and remanded her to the custody of the United States Marshal to be confined in the County Jail of the City and County of San Francisco, until she complied with said turn over order. (R. 10-15).

Argument.

I.

NO CLAIMED IRREGULARITY IN THE CONTEMPT PROCEEDINGS ON THE ORDER TO SHOW CAUSE IN THE COURT BELOW HAS BEEN SAVED FOR REVIEW IN THIS COURT BY APPELLANT.

None of the rulings of the United States District Court in the contempt proceedings were excepted to by appellant, and any assignments of error based upon said rulings is not subject to review in this Court.

Matheson v. U. S., 227 U. S. 540;
Palmer v. U. S., 6 Fed. (2) 145;
Gruher v. U. S., 55 Fed. 474.

In *Edwards v. U. S.*, 7 Fed. (2) 357, at page 358, the Court said:

> "None of the assignments of error raised questions based on rulings of the trial court duly excepted to. This court has repeatedly held that such assignments are unavailing."

Procedural questions cannot be raised for the first time on appeal.

> *Collins v. Traeger,* 27 Fed. (2) 842, 843 (9th Circuit).

And in accordance with the rules which govern the hearing and consideration of causes on appeal the appellate court will limit review in contempt cases to issues and matters properly presented and passed on by the trial court *and saved for review by proper exceptions seasonably made.*

> *Fairfield, et al. v. U. S.,* 146 Fed. 508;
> *Reeder v. Morton-Gregson Co.,* 296 Fed. 785.

There is therefore nothing for review before the appellate court relating to said contempt proceedings.

II.

IN THE ABSENCE OF A TRANSCRIPT OF THE CONTEMPT PROCEEDINGS THEIR REGULARITY AND CORRECTNESS WILL BE PRESUMED BY THE APPELLATE COURT.

> *Dunham v. U. S. ex rel. Kansas City Southern Ry. Co.,* 289 Fed. 376, 379.

Wholly apart from the question as to whether the rulings of the trial court in the contempt proceedings

can be assigned as error in view of the failure of appellant to save her exceptions, the bald statement that she was not afforded an opportunity to be heard finds no support in the record. Both the express language of the minute order, (R. 15) and the statement of the Court (R. 16-19) show she was given full opportunity to be heard in said contempt proceedings.

However, if as appellant contends, the statement of the trial court has no place in the record, notwithstanding her consent as evidenced by the stipulation of appellee at the end of said statement, (R. 20) then in the absence of a transcript of the contempt proceedings the regularity, correctness and validity of said proceedings must as previously indicated be conclusively presumed.

III.

THE ATTEMPTED DEFENSE OF APPELLANT AT THE HEARING ON THE CONTEMPT PROCEEDINGS WAS A COLLATERAL ATTACK ON THE TURN OVER ORDER OF MAY 22ND, 1933, AND THEREFORE UNAVAILING.

No exceptions were taken as against the report of the Special Master, or appeal taken from the turn over order, the findings of the Special Master are therefore not open to review by this Court. It must be conclusively presumed that the evidence fully supports said report.

Thompson Mach. Co. v. Sternberg, 55 Fed. (2) 715, 718;

Bourne v. Perkins, et al., 42 Fed. (2) 94, 97;

Rust v. MacLaren, 29 Fed. (2) 288, 290.

The statement of the Court (R. 16-19) will clearly show an attempt on the part of the appellant to go behind the turn over order.

She appeared at the hearing on the contempt proceedings with her counsel and informally moved for a re-reference to the Special Master with the avowed purpose of re-opening said accounting and introducing further alleged evidence which she admittedly failed to present during the said accounting before said Special Master prior to the making of said turn over order of May 22nd, 1933. No reason was assigned why said pretended evidence was not seasonably presented, nor was the purport of it revealed, and neither was there any suggestion, nor any attempt to introduce any evidence tending to prove that her alleged inability to comply with the turn over order arose subsequent to said turn over order.

It will be observed her purported answer (R. 3-4) to said turn over order, an anomaly in the law, is not based upon inability arising after the making of the turn over order, but by inability existing at the time said turn over order was made.

The law is well established that said turn over order may not be collaterally assailed and that the only evidence the Court could entertain on the contempt proceedings was evidence of inability to comply with the said turn over order from causes arising subsequent to the making of said order.

Thus in *Oriel v. Russell,* 278 U. S. 358, 73 L. ed. 419, a turn over order was made, directing the bankrupts

to turn over certain books to the Trustee which they failed to do. On the motion to commit for failure to comply with said order, the bankrupts sought to introduce evidence on the issue whether the books had been in their possession or under their control at the time of said turn over order. The Referee and the District Court refused to re-try that issue on the ground that the turn over order could not be collaterally attacked. On petition in certiorari, the Supreme Court, in connection with said turn over order said at page 424 L. ed.:

> "Being made, it should be given weight in the future proceedings as one that may not be collaterally attacked by an effort to try over the issue already heard and decided at the turn over. Thereafter on the motion for commitment the only evidence that can be considered is the evidence of something that has happened *since* the turn over order was made, showing that *since* that time there has newly arisen an inability on the part of the bankrupt to comply with the turn over order." (Italics ours.)

In *Sarkes v. Wells,* 37 Fed. (2) 339, no appeal was taken from the turn over order. On page 340 it was said:

> "The only defense open to the bankrupt here upon the contempt proceedings was that something had occurred since the order which rendered him unable to obey it. Oriel, Russell, supra. He made no such defense. He contented himself with denying that he had had possession or control of the property either *before or after* the

turn over order and asserting that it was therefore impossible for him to turn over that which he had never possessed. This insistence was not relevant to the issue in the contempt proceedings. It was an indirect attempt to annul the turn over order, which may not be collaterally attacked, and which within itself constituted a prima facie case against the bankrupt in the contempt proceedings." (Italics ours.)

IV.

THE BURDEN OF PROOF WAS UPON THE APPELLANT NOT ONLY TO SHOW INABILITY TO TURN OVER SAID TRUST FUNDS BUT THAT SUCH INABILITY AROSE AFTER THE TURN OVER ORDER.

Appellant complains that the report of the Special Master has not been made a part of the record on the appeal, and that therefore there was no evidence offered showing appellant had any of said trust funds in her possession or control at any time, and that the burden of proof was on appellee to show it by clear and convincing evidence.

It seems obvious that appellant has no clear conception of the issues involved. Assuming that the sufficiency of the evidence to support the findings of the Special Master were properly assigned as error, which presupposes the reservation of proper exceptions below, still it would be the duty of appellant to bring up, not only the report of the Special Master, but a transcript of the evidence upon which the report was

based and point out to this Court wherein the evidence is insufficient, otherwise in their absence all intendments and presumptions as to regularity and sufficiency will be indulged by the appellate court.

However, it has already been observed that the issue above mentioned is not before this Court for review and that the findings of the Special Master as adopted and confirmed by the District Court, to the effect that appellant had possession and control of said trust funds at the time of the turn over order is conclusive upon this Court, and the only escape from the consequences of her failure to obey said turn over order was a satisfactory showing in the trial court on the contempt proceedings that she was unable to comply with said turn over order due to causes arising subsequent to said order, and the burden of proof is upon her. Thus in *Oriel v. Russell,* supra, at page 425, L. ed., the Supreme Court quoting with approval from *Re Epstein,* 206 Fed. 568, said:

> "In the case in hand, the consequence is that, as the order to pay or deliver stands without sufficient reply, it remains what it had been from the first—an order presumed to be right, and therefore an order that ought to be in force. In the pending case, or in any other the court may believe the bankrupt's assertion that he is not in possession or control of the money or the goods, and in that event the civil injury is at an end; but it is also true that the assertion may not be believed; and the bankrupt may therefore be subjected to the usual pressure that follows wilful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty."

On the same page the Court continues:

> "In the two cases before us, the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, and in the motion for the contempt to show their inability to comply with the turn over order. *They did not succeed in meeting the burden which was necessarily theirs in each case, and we think, therefore, that the orders of the Circuit Court of Appeals in affirming the judgments of the District Court were the proper ones.*" (Italics ours.)

Appellant presented no evidence to the effect that her alleged inability arose after the turn over order, and there is no pretense to that effect, indeed, she sought to go behind the turn over order and show inability prior to the making of said turn over order.

V.

IN ORDER TO CONTROVERT THE PROPRIETY OF A REFERENCE TO A SPECIAL MASTER IN CHANCERY, A MOTION FOR REVOCATION SHOULD BE SEASONABLY MADE TO THE COURT WHICH GRANTED THE REFERENCE. A FAILURE TO MOVE FOR SUCH REVOCATION AT OR NEAR THE TIME OF THE GRANTING OF THE REFERENCE IS EQUIVALENT TO ACQUIESCENCE.

Flanders v. Coleman, 249 Fed. 757, 759;
Smith v. Brown, 3 Fed. (2) 926.

In the case last cited the Court said:

> "It must be said that the defendant acquiesced in the order of reference, or, in the absence of objection, the court had the right to assume that

the reference was agreeable to the parties. *Not until the Master was proceeding to take the testimony was there any objection to such course, and even then it was presented to the Master, and not to the court.* That was neither the time nor the place to initiate or to interpose the objection." (Italics ours.)

Moreover, the question as to the propriety of the reference is one of discretion with the Court, and in which the Court has a large and liberal discretion.

Bothwell Co. v. Bice, 247 Fed. 60, 64;
Holt Mfg. Co. v. Best Traction Co., 245 Fed. 354, 355.

VI.

THE COMMON LAW RULE THAT A DENIAL UPON OATH PURGES THE CONTEMPT DOES NOT OBTAIN IN THE FEDERAL COURT.

The old common law rule which made it optional with the accused to submit to a charge of perjury rather than contempt by false oath has never been applied by the Federal Courts.

Sweepston v. U. S., 251 Fed. 205;
U. S. v. Huff, 206 Fed. 700.

VII.

COMMITMENT UPON FAILURE TO TURN OVER TRUST FUNDS BY ORDER OF COURT IS NOT IMPRISONMENT FOR DEBT.

"Where the order of court directs the surrender to the proper officer of property in respect

to which the court has jurisdiction, the obligation and duty of the person to whom it is directed to surrender cannot be converted into a debt by his mere refusal to comply with the order. The commitment for disobedience of an order directing that property belonging to the bankrupt estate be delivered to the Trustee, is not a punishment for nonpayment of a debt. There is no debt due the Trustee. The punishment is inflicted for the failure to perform a legal duty."

Collier on Bankruptcy, 13th ed., Vol. 1, p. 89, sec. b, and authorities cited.

VIII.

THE AFFIDAVIT OF MARTIN J. DINKELSPIEL WAS SUFFICIENT TO SUPPORT THE ORDER TO SHOW CAUSE FOR CONTEMPT.

An affidavit in support of an order to show cause may be based upon information and belief.

Employers' Teaming Co. v. Teamsters' Joint Council, et al., 141 Fed. 679, 686.

The affidavit averred on information and belief that appellant had not complied with the turn over order. There has been at no time any pretense that she had complied with such order, and at the contempt hearing the Court found upon satisfactory proof that she did not.

It is next asserted her ability to pay over said funds should have been set forth in the order of commitment. It is submitted that the order of imprison-

ment and commitment contains language showing her ability to comply with said order. The findings of the Special Master as adopted and confirmed by the Court are set forth in said order. The findings of the Special Master found that she had said trust funds in her possession and under her control at the time of the turn over order which conclusively implies she then had the ability to comply with said turn over order. No evidence was presented by her at the hearing on the contempt proceedings in proof of any change of circumstances after the turn over order. Her ability to comply with said order must therefore be presumed to have continued.

In *Oriel v. Russell,* supra, lack of possession and control were construed in effect as inability to comply with the turn over order. There it will be recalled the Court refused to allow the bankrupt to present evidence showing no possession or control at the time of the turn over order on the ground it constituted a collateral attack on said order.

That possession or control is equivalent to ability to comply with an order directing a turn over of property or funds is well established.

In re Adler, 129 Fed. 502;
In re Wilson, 116 Fed. 419.

In *In re George P. Rosser,* 101 Fed. page 562, at page 566, the Court said:

> "But, it appears to the satisfaction of the Referee for the Court that property of the bankrupt estate is in control or possession of the bankrupt, a lawful order for its delivery to the Trustee may

be made, and a refusal to obey this order may be punished as a contempt of court, both under the general law relative to contempt and under the specific provisions of the Bankruptcy Act."

In *Collier on Bankruptcy,* 13th ed. at pp. 993 and 994, the author, supported by a large number of authorities, said:

> "Property of a bankrupt estate, traced to the recent control or possession of the bankrupt, *or a third person* is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance, and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate; it is still the duty of the Referee and of the court, if satisfied that such property is in his possession or under his control, to order him to surrender it to the Trustee and to enforce said order by confinement as for contempt." (Italics ours.)

Conclusion.

The brief of appellant is but a transparent attempt to delay the inevitable. It marks the close of a stubborn and protracted resistance to the payment over of trust funds to their rightful owner found to be in the possession and under the control of appellant.

The complaint of appellant that the report of the Special Master is not before this Court cannot be seriously considered. She could have made it a part of the record on appeal had she so desired. Indeed,

a diminution of the record will show appellee sought to bring up the entire proceedings taken before the Special Master to which appellant filed and urged written objections, which were sustained by the trial court on the theory that the findings of the Special Master were not open to review on this appeal.

Again, the charge that the commitment of appellant was ordered without a hearing on the order to show cause is as groundless as it is absurd. As previously shown the findings of the Special Master and the turn over order of the Court, unchallenged, found in her possession and under her control the sum of $16,784.20, a part of $29,759.12, trust funds that wrongfully came into her possession, the property of the Bankrupt, and the difference of which she apparently squandered. Having failed to except to the findings of the Special Master, or to appeal from the turn over order, she was limited at the hearing of the order to show cause to show inability to perform the turn over order by reason of causes arising *subsequent* to said order, and the burden of proof was upon her which she failed to meet, offering no evidence at all. The Court under the circumstances had no other alternative, although it was at all times generously considerate of appellant's rights.

The fear of going beyond the record restrains appellee from going into the history of the case to afford the Court a proper and an illuminating perspective.

It is submitted in conclusion that there is no merit to this appeal and that the order appealed from be affirmed to the end that appellant be obliged upon pain of imprisonment to restore trust funds to their owner, said bankrupt corporation, found to be in her possession and control.

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